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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE CAPACITORS ANTITRUST
LITIGATION

This Document Relates To:
DIRECT PURCHASER PLAINTIFFS
ACTION

Master File No. 3:14-cv-03264-JD
MDL No. 2801

**JOINT INITIAL PRETRIAL
CONFERENCE STATEMENT**

Date: Jan. 2, 2020
Time: 1:30 p.m.
Place: Courtroom 11, 19th Floor
Hon. James Donato

In advance of the initial pretrial conference to be held on January 2, 2020 at 1:30 p.m., and consistent with the Court's instruction, the Direct Purchaser Plaintiffs ("DPPs" or "Plaintiffs") and undersigned Defendants hereby submit this Joint Initial Pretrial Conference Statement.

I. Pretrial Schedule.

Subject to the Court's approval, DPPs and Defendants have agreed to the following pretrial schedule:

Event	Date
<i>Meet and confer regarding pretrial filings</i>	<i>Dec. 20, 2019 – Complete¹</i>
Deadline for Defendants to provide DPPs with edits/revisions to proposed jury instructions and verdict form	Dec. 23, 2019 – Complete
Deadline to exchange proposed exhibit lists	Dec. 27, 2019 – Complete, <i>but see</i> the Parties' positions in Section IV, below
<i>Initial Pretrial Conference</i>	<i>Jan. 2, 2020 at 1:30 p.m.</i>
Meet and confer regarding motions <i>in limine</i>	Jan. 3, 2020
Deadline to exchange proposed witness lists	Jan. 6, 2020
<i>Deadline to serve motions in limine</i>	<i>Jan. 6, 2020</i>
Deadline for the Parties to exchange their portions of Joint Pretrial Statement	Jan. 9, 2020
Meet and confer regarding proposed jury instructions and verdict form	Jan. 10, 2020
Deadline to exchange lists of (a) objections to exhibits and (b) additional exhibits	Jan. 10, 2020
Deadline to exchange objections to additional exhibits	Jan. 13, 2020
Deadline for the Parties to exchange responding portions of the Joint Pretrial Statement	Jan. 14, 2020

¹ Events and dates in italics have been set either by the Court's Standing Order For Civil Jury Trials Before Judge James Donato or by the Order found at MDL ECF No. 1037.

Event	Date
In-person meet and confer regarding exhibits	Jan. 15, 2020
<i>Deadline to serve oppositions to motions in limine</i>	<i>Jan. 16, 2020</i>
Deadline for the parties to finalize their portions of Joint Pretrial Statement	Jan. 19, 2020
<i>Pretrial filings due:</i> <ul style="list-style-type: none"> • <i>Deadline to file charts of (a) admissible exhibits; and (b) disputed exhibits;</i> • <i>Deadline to file proposed jury instructions and verdict form;</i> • <i>Deadline to file joint witness list (including brief statement describing substance of testimony and estimate of amount of time testimony will take (direct and cross));</i> • <i>Deadline to file motions in limine and oppositions (movants to file pairings);</i> • <i>Deadline to file trial briefs; and</i> • <i>Deadline to file Joint Pretrial Statement</i> 	<i>Jan. 20, 2020</i>
<i>Deadline to email Word version of proposed jury instructions and verdict form to jdpo@cand.uscourts.gov</i>	<i>Jan. 21, 2020 by noon Pacific</i>
Deadline to exchange deposition designations	<i>See the Parties' positions below</i>
Deadline to exchange deposition counter-designations or objections to designations	<i>See the Parties' positions below</i>
Deadline for exchange of objections to counter designations	<i>See the Parties' positions below</i>
<i>Meet and confer regarding deposition designations and objections</i>	<i>Feb. 11, 2020</i>
<i>Pretrial Conference</i>	<i>Feb. 13, 2020 at 1:30 p.m.</i>
<i>Deadline to file deposition designations (including counter-designations or objections)</i>	<i>Feb. 26, 2020</i>
<i>Deadline to submit exhibit binders to Court</i>	<i>March 2, 2020</i>
<i>Trial start date</i>	<i>March 2, 2020 at 9:00 a.m.</i>

1 In addition to these agreed-upon dates, the parties have agreed to exchange
2 demonstrative exhibits two days before their intended use.

3 **A. Plaintiffs' Position on Deposition Designations.**

4 This case has been pending for over five years. Trial had previously been set for
5 February 2, 2020, and after a brief continuance related to the PGE bankruptcy litigation trial
6 was reset to March 3, 2020. There is no reason why the parties should not have been
7 preparing for trial such that they can exchange deposition designations on a reasonable date.
8 There are several reasons why. First, there is no reason whatsoever to think that anyone is
9 going to review and offer testimony at trial from 275 deposition transcripts. Second, while
10 Plaintiffs may use most of the depositions in this case against the defendants, the
11 defendants do not have that right vis-à-vis plaintiffs and thus have nowhere near 275
12 deposition transcripts that they could potentially designate. Third, the burden here is clearly
13 on DPPs, who have no power to compel defendants' employees and former employees to
14 appear at trial and thus must rely on deposition testimony much more than defendants.
15 DPPs are not only prepared to, but believe it is essential that designations happen sooner
16 because counter-designations, objections, and meet-and-confers about objections need to
17 take place and that should happen sooner rather than later.

18 **B. Defendants' Position on Deposition Designations.**

19 There are approximately 275 deposition transcripts in this case that need to be
20 reviewed and excerpted for common issues among the Defendants as well as Defendant-
21 specific issues. While this work is already under way, completion will take an
22 extraordinary amount of time and it is critically important to Defendants' evidentiary
23 presentations at trial. For this reason, as well as the press of other work that needs to be
24 completed prior to the January 20, 2020 pretrial filing deadline, Defendants have proposed
25 that deposition designations be completed after the pretrial filing deadline, on a schedule
26 that provides the Parties with the time necessary to counter designate, object, meet and
27 confer and ultimately meet the deadline to file deposition designations with the Court.

28

Thus, Defendants have proposed that the Parties exchange deposition designations on January 31, 2020, exchange objections and counter designations on February 7, 2020, and exchange objections to counter designations on February 10, 2020. This schedule will not impact the Parties' agreed-upon February 11, 2020 date to meet and confer on deposition designations or the February 26, 2020 deadline to file deposition designation materials set by the Court's Standing Order. Defendants respectfully request that the Court enter an Order adopting this deposition designation schedule.

II. Trial Length.

A. Plaintiffs' Position.

The Class understands that the Court will impose time limits and that trial time will be split 50-50 between the plaintiffs and defendants. *General Signal Corp. v. MCI*, 66 F.3d 1500, 1508 (9th Cir. 1995) (district court may impose reasonable time limits), *citing* *Monotype Corp. v. International Typeface Corp.*, 43 F.3d 443, 451 (9th Cir. 1994) (upholding time limits even though "it provide significantly less time than the parties estimated would be required"). *Id.* Plaintiffs will be prepared to begin trial on March 3, 2020. The Class is of the view that a trial can be concluded in fewer than five weeks and notes that the only occasion when the parties had together considered a trial of that length or longer was before the appointment of lead class counsel, Rule 12 proceedings, discovery, or guilty pleas and at a time when all 22 Defendants remained in the case and the trial under consideration would have included both direct and indirect purchaser plaintiffs.

B. Defendants' Position.

Defendants respectfully submit that a fair and orderly trial of this case will require at least 5 weeks for several reasons. First, 7 corporate families remain as Defendants in DPPs' case and approximately 14 other corporate families are alleged to be co-conspirators. Beyond the sheer number of Defendants and alleged co-conspirators, each Defendant's case will involve unique evidence and issues of law and fact. For example, several Defendants and alleged co-conspirators were not part of any government investigation into the alleged conspiracy. Other Defendants and alleged co-conspirators are alleged to have been part of

the alleged conspiracy during different time periods, which raise individualized joint and several liability issues. And still other Defendants and alleged co-conspirators were not active in selling the products at issue or to the customers in the DPP class, which raise questions about their participation in the alleged conspiracy as well as the critical issue of class-wide injury. Second, Defendants currently estimate that approximately 25 percipient witnesses and 7 expert witnesses, which include joint experts as well as experts for individual Defendants, will testify live in Defendants' case. Third, many of Defendants' percipient witnesses will testify through a translator, which more than doubles the amount of time that these witnesses will be on the stand. Finally, DPPs' initial exhibit list, which contains *over 3,200 exhibits*, which is discussed below in Section IV, is further evidence that trial cannot be completed in the amount of time DPPs are proposing.

A number of recent, similar antitrust trials in this District – each of which involved far fewer defendants – required more or the same amount of time than what Defendants estimate for this matter. For example, the direct purchaser plaintiff trial in *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, 07-md-01827 (N.D. Cal.) (Illston, J.), involving only 1 defendant, lasted 6 weeks. Likewise, the single-plaintiff opt-out trial in *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, 07-md-01827 (N.D. Cal.) (Illston, J.), involving 2 defendants, also ran for 6 weeks. And trial in *In re Korean Ramen Antitrust Litigation*, 13-cv-4115 (N.D. Cal.) (Orrick, J.), involving only 2 defendants, lasted 5 weeks.

Accordingly, Defendants respectfully request that the Court set aside at least 5 weeks to complete trial in this matter.

III. Opening Statements.

A. Plaintiffs' Position.

The Class believes that 30 minutes is sufficient for opening statements for each side and that that limit should apply to statements presented on behalf of all Defendants. The Class would not object, however, to supplemental opening statements presented by individual Defendants of any duration on individual issues, including up to Defendants' requested length of three hours.

1 **B. Defendants' Position.**

2 Mindful of the Court's rule that opening statements are generally limited to 30
3 minutes per side, (Standing Order For Civil Jury Trials Before Judge James Donato at ¶
4 35), Defendants believe that they will need additional time to present a concise, coordinated
5 and comprehensive opening statement that introduces the Defendants and the alleged co-
6 conspirators and provides the jury with an overview of the relevant issues and facts that will
7 be established by the evidence. In order for the jury to have the appropriate context to
8 understand the evidence as it starts to come in, the jury will need a basic understanding of
9 what the evidence will be as to the products at issue, the customers at issue, the marketing
10 mechanisms at issue, the unique and differentiated businesses of the Defendants and the
11 alleged co-conspirators as well as the evidence regarding each Defendants' and alleged co-
12 conspirator's participation or non-participation in the alleged conspiracy.

13 Thus, in order to avoid duplication and save time, Defendants request that they be
14 permitted to provide the jury with a single opening statement that relates to all Defendants,
15 followed by shorter statements by particular Defendants focused on issues and evidence
16 unique to their cases. Defendants estimate that they can accomplish a complete opening
17 statement, with the joint presentation and individual presentations described above, in 3
18 hours or less, but believe that the allocation of this amount of time should be left to
19 Defendants' discretion.

20 **IV. Exhibit Lists.**

21 **A. Plaintiffs' Position.**

22 Defendants first sent their language below at about 4 p.m. Pacific on the day this
23 statement is due. The issue is very simple. DPPs have no expectation that they will have an
24 exhibit list of 3,200 entries, as trial counsel will no doubt enter into many stipulations of
25 fact, stipulations as to the authenticity of documents produced by Defendants, and
26 agreements on the presentation of evidence through summary exhibits. Fed. R. Evid. 1006.
27 However, the fact is that the evidence of conspiracy in this case spans a duration of at least
28 twelve years and included regularly scheduled cartel meetings throughout that period. If

1 reasonable agreements are reached DPPs have no doubt that they will cut their exhibit list
 2 substantially. However, no meaningful meet-and-confer has happened yet. DPPs suggest
 3 that the Court have counsel report to Court early on January 2, 2020, to begin their meet-
 4 and-confer about these issues.

5 **B. Defendants' Position.**

6 On Friday, December 27, 2019, DPPs provided Defendants an "initial" exhibit list
 7 of over 3,200 entries, more than three times the number of entries on the Defendants'
 8 combined list. Bearing in mind the Court's reference to "focus[ing] and streamlin[ing] trial
 9 preparation" (ECF 1040), Defendants have worked hard to prepare and provide pretrial
 10 exchanges that are tailored to the evidence and issues that will actually be presented at trial.
 11 Unfortunately, the same cannot be said for the DPPs.

12 With over 3,200 entries, DPPs' exhibit list cannot be considered a good faith effort
 13 of providing an initial trial exhibit list consistent with Rule 26(a)(3)(A)(iii) of the Federal
 14 Rules of Civil Procedure, which requires "an identification of each document or other
 15 exhibit . . . the party expects to offer and those it may offer if the need arises." Indeed, a list
 16 of this length is completely inconsistent with DPPs' repeated, prior representations that they
 17 envision only a week or two to present their case in chief. (Tr. of Nov. 7, 2019 Status
 18 Conference at 8:11-15, 10:12-13.) It is also inconsistent with DPPs' October 4, 2019 letter
 19 to Defendants regarding documents that DPPs intend to use at trial, which identified only a
 20 small fraction of these 3,200 documents. Under the circumstances, an initial exhibit list of
 21 this length violates the Federal Rules of Civil Procedure, not to mention implicating Federal
 22 Rules of Evidence 403 (court may exclude relevant evidence that risks "undue delay,
 23 wasting time, or needlessly presenting cumulative evidence") and 611(a) (court "should
 24 exercise reasonable control over the mode and order of . . . presenting evidence so as to . . .
 25 avoid wasting time") and the spirit in which they were written.

26 In an effort to address this issue, on December 29, 2020, Defendants requested that
 27 DPPs reconsider their position, send an amended list and provide Defendants with a few
 28 additional days to evaluate the revised list. Minutes later, DPPs responded that the

December 27 list “is [DPPs’] exhibit list” and that they “object to [Defendants’] taking any extra time.”

DPPs’ overbroad exhibit list and their subsequent refusal to tailor it does not just burden the Defendants during a critical stage of trial preparation. It also inevitably gives rise to unnecessary disputes that will waste the resources of the Court and counsel. For all these reasons, Defendants respectfully request that the Court (i) direct DPPs to produce on or before January 5, 2020 an exhibit list with those documents DPPs truly “expect[] to offer and those [they] may offer if the need arises”; and (ii) allow Defendants to raise objections and offer rebuttal exhibits during trial, as necessary.

V. Pending Motions.

A. List of Motions.

The following motions are pending in the DPP case:

Summary Judgment Motions

1. Film-Only Defendants’ Joint Motion for Summary Judgment (MDL ECF 687).
2. Certain Defendants’ Joint Motion for Summary Judgment Against Direct Purchaser Plaintiffs’ Claims (MDL ECF No. 673).
3. Holy Stone Defendants’ Motion for Summary Judgment and Motion for Partial Summary Judgment on Direct Purchaser and Direct Action Plaintiffs’ Claims (MDL ECF No. 671-4).
4. AVX Corporation’s Motion for Summary Judgment Against all Plaintiffs (MDL ECF No. 651).
5. United Chemi-Con, Inc.’s Motion for Summary Judgment (MDL ECF No. 665).
6. Nippon Chemi-Con Corp.’s Motion for Summary Judgment (MDL ECF No. 656).

Daubert Motions

7. Certain Defendants' Motion to Exclude the Proposed Expert Testimony of Dr. James T. McClave (MDL ECF No. 661).

8. Certain Defendants' Joint Motion to Exclude Testimony of Dr. Hal J. Singer (MDL ECF No. 647).

9. Certain Defendants' Motion to Exclude the Proposed Expert Testimony of Joseph P. Russoniello (Civ. ECF No. 2333).

10. Direct Purchaser Class and Indirect Purchaser Plaintiffs' Motion to Exclude, in Part, the proposed Expert Testimony of Spencer L. Simons (MDL ECF No. 672).

11. Direct Purchaser Class's Motion to Partially Exclude Proposed Expert Testimony of Janusz A. Ordover (MDL ECF No. 669).

Other Motions

12. Defendants' Motion for Decertification of Direct Purchaser Plaintiff Class (MDL ECF No. 992).

13. Defendants' Motion Requesting Consideration of and Decision on KEMET's Motion for Summary Judgment (MDL ECF No. 1017) (noticed for hearing on January 9, 2020).

14. Defendants ELNA and Matsuo's Motion to: (1) Admit Trial Testimony and (2) Preclude Evidence of Prior Invocations of the Fifth Amendment of Messrs. Inoue, Kinoshita, Imai and Okubo (MDL ECF No. 1030) (noticed for hearing on January 9, 2020).

15. Defendants Nippon Chemi-Con Corp. and United Chemi-Con, Inc. have noticed a January 30, 2020 hearing date on their Motion for an Order (I) Allowing Noriaki Kakizaki to Testify Substantively at Trial and (II) Precluding Plaintiffs from Offering Evidence of Mr. Kakizaki's Prior Invocation of His Fifth Amendment Rights at an Earlier Deposition (MDL ECF No. 1045) (noticed for hearing on January 30, 2020).²

² It is DPPs' position that the last two motions constitute two of defendants' collective motions *in limine*. Defendants disagree.

B. Defendants' Statement.

The motions listed above as numbers 13 (MDL ECF No. 1017), 14 (MDL ECF No. 1030), and 15 (MDL ECF No. 1045) are relevant to Defendants' trial preparations as well as Defendants' plans for trial presentations. Thus, Defendants respectfully request that the Court hold hearing on these motions on January 9 and January 30, 2020, as noticed.

VI. Recent Productions and Document Translations.

A. Plaintiffs' Statement.

Defendants are continuing to produce documents in violation of Rule 34 and the Court's Scheduling Orders. The most recent documents, produced by the ELNA Defendants this past Friday, December 27, 2019, would appear to be basis for undisclosed percipient or expert testimony. Plaintiffs' experts did not have an opportunity to review these materials before preparing their reports or giving deposition testimony. Plaintiffs' trial preparation has substantially advanced without these documents.

Plaintiffs' discovery requests in this action expressly requested product catalogs, Plaintiffs' experts have made use of such catalogs in their analyses, and the Defendants' product portfolios have been the subject of expert testimony.

Defendants' proposal to submit alternative translations of the documents evidencing Defendants' conduct would clearly prejudice Plaintiffs. The Class has produced translations of documents introduced at deposition and submitted in support of its briefing months and in most cases years ago. Defendants raised general objections but never offered translations of their own. To the extent Defendants possessed alternative translations, they should have been produced long ago. They should not now be permitted to submit their own preferred versions, or rewrite the translations to suit their preference, on the eve of trial.

B. Defendants' Statement.

On Friday, December 27, 2019, the same day the parties exchanged initial trial exhibit lists, ELNA provided plaintiffs with sixteen (16) documents it intends to use as trial exhibits. It did so in compliance with the pretrial disclosure requirements of Fed. R. Civ. P. 26(a)(3)(A)(iii). Nine (9) of these documents are annual catalogues of capacitors sold by

ELNA, which are not responsive to or necessary to satisfy plaintiffs' requests for the production of documents as objected to by ELNA. The other seven (7) documents are translations of previously-produced documents. These translations were prepared by ELNA for the Department of Justice and, according to the Court's April 30, 2015 order pertaining to the DOJ's electrolytic investigation, not required to be produced. See 14-cv-3264, Dkt. 678 ("The Court denies plaintiffs' request for copies of the English-translated documents that were provided by defendants to the DOJ."). In addition, ELNA obtained certificates of accuracy for these seven (7) translations in November 2019, and produced the certificates of accuracy along with the translations. Accordingly, neither ELNA nor any other Defendant is "in violation of Rule 34 and the Court's Scheduling Orders."³

As a more general matter, Defendants intend to provide DPPs with additional document translations or counter-translations to translations previously provided by DPPs. Since October 2019, Defendants have attempted to negotiate a process and schedule for doing this, but DPPs have continued to claim that the production of such translations are "late." Defendants plan on producing to DPPs all additional document translations and counter translations by February 12, 2020, well in advance of trial.

VII. Motions *In Limine*.

A. Plaintiffs' Position.

Like much of this statement, the section below was sent to DPPs late on the day that it was due, and seems to reflect a lack of understanding of DPPs' position that could be solved easily through meet-and-confer. Before this was sent, defendants had indicated that they would abide by the Court's standing order (as noted above, defendants have already used two of their motions *in limine*.). This draft was the first time that DPPs learned that Defendants changed their position, but as set forth above there is reason to believe that

³ In fact, on the same day, DPPs produced to Defendants two new translations of documents previously produced in this action.

counsel will be able to substantially reduce their exhibit lists once they meet-and-confer, and as a result defendants will not need to expand their motions *in limine*.

B. Defendants' Position.

As set forth in the Parties' November 1, 2019 Joint Status Conference Statement, Defendants envisioned a possibility that they may require more than the 8 motions *in limine* per side, as permitted by the Court's Standing Order, depending on the Parties' proposed exhibit lists. (MDL ECF No. 994 at 3.) Now that Defendants have seen DPPs' initial exhibit list, with over 3,200 potential exhibits, it has become clear that the seven remaining Defendant families will require, collectively, more than 8 motions *in limine*. In order to help streamline trial and the presentations of evidence, Defendants believe that they can address all these evidentiary issues in no more than 12 motions *in limine* and request that the Court permit them to do so.

Enlarging the number of motions *in limine* is consistent with recent antitrust trials in this District, each of which, again, involved far fewer defendants. For example, in the direct purchaser plaintiff trial in *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, 07-md-01827 (N.D. Cal.) (Illston, J.), the parties filed fifty-one motions *in limine*. (See Dkt. No. 5597.) Likewise, in the opt-out trial in *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, 07-md-01827 (N.D. Cal.) (Illston, J.), the parties filed forty-two motions *in limine*. (See Dkt. 8298.) While Defendants are not proposing an expansion in motions *in limine* of these proportions, it is Defendants' view that a modest expansion of the motion *in limine* limit to 12 per side is necessary. In addition, Defendants have committed to a meet and confer process with DPPs aimed at reaching stipulations on evidence and thus minimizing the number of motions *in limine* needed by both sides.

Dated: Dec. 30, 2019

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